LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAR 12 1975
MICHAEL RODAK, JR., CLERK

No. 74-1032

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1974

SCOTT HUDGENS, an Individual,
*Petitioner,*

v.

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO,
*Respondent.*

**On Petition for a Writ of Certiorari to the Court of Appeals of Georgia**

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITIONER

MILTON A. SMITH,
General Counsel,

RICHARD B. BERMAN,
Labor Relations Counsel,
Chamber of Commerce of the United States of America,
1615 H Street, N.W.
Washington, D.C.

GERARD C. SMETANA,
THOMAS CANAFAX, JR.,
Borovsky, Smetana, Ehrlich & Kronenberg
120 South LaSalle Street
Suite 1820
Chicago, Illinois 60603

*Attorneys for the Amicus Curiae*

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

---

No. 74-1032

---

SCOTT HUDGENS, an Individual,
*Petitioner,*

v.

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO,
*Respondent.*

---

**On Petition for a Writ of Certiorari to the Court of Appeals of Georgia**

---

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITIONER

---

### INTEREST OF THE AMICUS *

1. The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of com-

---

* There have been lodged with the Clerk of the Court the written consents of the parties to the captioned proceeding to the filing of this *amicus brief*.

merce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

2. The Chamber regularly represents the interests of its member-employers in important labor relations matters vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.**

The question presented here, which is of serious importance to the Chamber and its members, is: whether state courts are preempted by the National Labor Relations Act, from their traditional jurisdiction to grant a remedy in trespass for picketing upon private premises, which is not protected by federal legislation. The question is of widespread significance to the labor management community, including the Chamber's members, because absent such state jurisdiction, there is not available any other forum which can grant relief for picketing which exceeds the federal protection. Consequently the resolution of the problem will widely affect the manner in which business firms generally may regulate the use

---

** *E.g., N.L.R.B.* v. *Textron, Inc.*, —— U.S. ——, 85 LRRM 2945 (1974); *Geduldig* v. *Aiello, et al.*, —— U.S. ——, 8 F.E.P. Cases 97 (1974); *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971); *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213, 34 L. Ed. 2d 422 (1972); *Boy's Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *H.K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970); *Sears Roebuck and Co.* v. *Carpet Layers Local 419*, 397 U.S. 655 (1970); *Super Tire Engineering Co., et al.* v. *McCorkle, et al.*, —— U.S. —— 85 LRRM 2913 (April, 1974); *N.L.R.B.* v. *Mobil Oil Corp.*, 482 F.2d 842 (1973); *N.L.R.B.* v. *Frank Visceglia and Vincent Visceglia t/a Peddie Buildings*, —— F.2d ——, 86 LRRM 2541 (CA 3, 1974); *Scott Hudgens* v. *N.L.R.B.*, —— F.2d ——, No. 73-3264 (CA 5, 1974).

of their property and, more particularly, will affect the method of doing business by retail merchants and others involved in the operation of shopping centers for whom the problem is most acute. The Chamber by virtue of its representation of a broad segment of the business community, and its continuing interest in this area, is in a position to urge views which neither party has urged. The Chamber has previously filed an *amicus brief* in the companion case of *Scott Hudgens* v. *N.L.R.B.*, No. 74-773 (*Scott Hudgens I*), in which a petition for a writ of certiorari is presently being sought.

## ARGUMENT

### A. Both the Instant Case and *Scott Hudgens I* Should Be Considered Contemporaneously As the Issues Presented Are Interrelated.

The facts and issues of this case intertwine with those of *Scott Hudgens I* and there are considerations of law and policy common to both. Not only does the instant case (*Scott Hudgens II*) in its own right pose a serious question concerning state-federal relations, but together these two cases concisely present crucial facets of the need to balance competing interests with respect to picketing upon private property which is indirectly related to the owner's use thereof. Accordingly the Court should grant the petitions for certiorari and consider both cases together.

In *Scott Hulgens I*, the union conducted its picketing on the premises of a privately owned shopping center in which the picketed employer maintained a place of business; however, the dispute giving rise to the picketing involved employees working at a warehouse located away from the premises and neither the owner of the shopping center nor the employer-lessee could take any measures at the picketed situs to resolve the dispute. For this reason, the picketing was only indirectly related to the

use of the property. The question raised there concerns the accommodation to be made between the union's interest in publicizing its dispute and the proprietary interest of the shopping center's owner who was not involved in the dispute. The instant *Scott Hudgens II*, involving the same picketing and the same parties, arises from the holding of the Georgia state court that its jurisdiction to enforce the state trespass laws is preempted by the federal labor statutes. Here, the accommodation to be made is between the federal labor policy and the deeply rooted state interest in preserving public order through enforcement of its trespass laws.

The resolution of these interrelated questions is of urgent importance to the labor-management community, as well as to the maintenance of the proper balance of federal-state relationships. Further, these companion *Scott Hudgens* cases present a unique opportunity for the Court to fully examine both issues and the interplay of each upon the other.

**B. Reasons For Granting The Writs of Certiorari In Scott Hudgens I and II.**

1. As this Court has already recognized, the question of whether a state may enjoin picketing that trespasses upon private property poses a "threat of grave state-federal conflict which [this Court] need[s] . . . to resolve." *Taggart* v. *Weinacker's, Inc.*, 397 U.S. 223, 225 (1970). This question has long eluded the Court's scrutiny. (Compare, *Taggart, supra*, with *Amalgamated Meat Cutters, Local No. 427* v. *Fairlawn Meats, Inc.*, 353 U.S. 20, 24 (1957) wherein the Court noted that, "Whether a State may frame and enforce an injunction aimed *narrowly* at a trespass . . . [involving picketing conducted upon private premises] is a question that is not here." See also, *Amalgamated Food Employee's Local 590* v. *Logan Valley Plaza*, 391 U.S. 308, 309, n.1

(1968)). Because of the lack of authoritative guidance by this Court, the state courts have reached discordant results.[1] Heretofore, this question appeared in the relatively clear-cut posture in which the federally protected right to picket did not encroach upon the state's enforcement of its trespass laws, since public sidewalks abutting the picketed premises ordinarily offer an adequate alternative site for picketing. (See *Taggart, supra.*) However, the court of appeals, in *Scott Hudgens I*, held the union's interest under federal law sufficient to allow picketing on the private premises of the shopping center, except where there were adequate alternative means of access to the intended audience. The exception was so narrowly construed by the court below as to permit the picketing here, and to create a general standard which significantly impairs the owner's control over the use of his property. This holding plainly creates an incursion upon the traditional power of the state to regulate trespass upon private property. Thus, the problem of reconciling state and federal interests raised in *Scott Hudgens I and II* is even greater than the Court in *Taggart* foresaw. The Court should grant certiorari to define the respective roles of the federal and state authorities in these circumstances.

2. In holding that state jurisdiction was ousted, the Georgia court here, in *Scott Hudgens II*, misconceived the nature of the problem and therefore failed to apply the controlling principles. The federal legislation has not fully occupied the field, for it does not comprehensively regulate picketing on private property. Indeed, as

---

[1] Compare the decision of the Georgia court below in *Scott Hudgens II* with the conflicting decisions of other state courts holding their jurisdiction not preempted by the NLRB. *People* v. *Goduto*, 21 Ill. 2d 605, 174 N.E. 2d 385 (1961), *cert. den.* 368 U.S. 927; *Hood* v. *Stafford*, 213 Tenn. 684, 378 S.W. 2d 766 (1964); *Morland Corporation* v. *Retail Store Employees Union, Local No. 444*, 16 Wisc. 2d 499, 114 N.W. 2d 876 (1962).

a general rule, picketing on private property is not protected by the Labor-Management Relations Act. *N.L.R.B.* v. *Central Hardware*, 407 U.S. 539 (1972). Even in those exceptional cases where the propriety of such picketing and related activity hinges on alternative means of access,[2] a determination that such alternatives exist will render the picketing unprotected by the federal act. Thus, though such unprivileged picketing is not protected, neither is it prohibited by the Labor-Management Relations Act.

Under these circumstances, the Georgia court misapplied *Garmon*[3] by failing to recognize that state power has not been withdrawn "where the activity regulated was a merely peripheral concern of the Labor-Management Relations Act—. . . [o]r where the regulated conduct touched interests . . . deeply rooted in local feeling and responsibility" (*supra*, 359 U.S. 236, at 244). Few matters are more deeply rooted in state responsibility than the enforcement of trespass remedies as a means of defusing the potential for violence inherent in spontaneous confrontations between parties over the use by one party of the premises of the other.[4] Further, trespass is of only peripheral concern to the administration of the federal act, as the use of private property for picketing is not critical to the federal right except in unusual cases and in those cases no remedy is afforded by the federal act for abuses of the right to picket.

3. The ouster of state jurisdiction would deprive employers and property owners of any remedy whatsoever

---

[2] See, *N.L.R.B.* v. *Babcock and Wilcox Co.*, 351 U.S. 105 (1956); *N.L.R.B.* v. *S & H Grossinger's, Inc.*, 372 F. 2d 26 (2nd Cir., 1967).

[3] *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959).

[4] *People* v. *Goduto*, 21 Ill. 2nd 605, 609, 174 N.E. 2d 385, 387 (1961), cert. den., 368 U.S. 927.

where picketing on private premises was neither protected nor prohibited by the federal statute. The N.L.R.B. is not empowered to grant either the employer or owner of such premises relief where it is found that picketing conducted on private property is not priviliged under the federal statute. Professor Archibold Cox has correctly observed:

> ". . . ouster [of state jurisdiction in trespass cases] results in the complete denial of a legal or equitable remedy to employers who by hypothesis are entitled to relief. The cost of denying one group the remedies to which it is entitled seems an extraordinarily heavy price to pay in order to avoid the danger that state tribunals may sometimes err by granting relief barred by the federal act.
>
> * * * *
>
> "Nor can the employer secure an NLRB determination that the activities are 'unprotected' even when that would be the ultimate ruling if the question could be raised. Under current practice, the question can arise only if the employer uses self-help to punish employees who engage in the activities and if the union or an employer then files an unfair labor practice charge alleging violation of Section 8(a)(1). The employer who sought to precipitate such litigation would get a ruling much too late to be of value, if he obtained it at all. Possibly the NLRB could change its rules to provide some kind of declaratory proceeding, but even apart from the familiar objections to advisory rulings it is hard to see how the case could be presented and decided with sufficient speed to open the door to state tribunals in time to prevent irreparable harm.
>
> "The short of the matter, therefore, is that in order to avoid the risk of a state court misinterpretation or misfinding, the 'arguably protected' rule shuts the door to determination of the question, and thus de-

> nies the hope for remedy for what might well turn out to be a substantive wrong. In effect, it denies the employer a day in court." (footnotes omitted) Cox, "Labor Law Preemption Revisited", 85 Harv. Law Rev. 1337, at 1362-1363 (May, 1972).

Thus, as in other areas of overlapping concern, such as libel and slander in an organizational campaign, mass picketing and picket line violence, in which traditional state interests converge with the periphery of federal labor policy, the states must be accorded a concurrent role with the NLRB in enforcing the rights of the parties.[5] The need for trespass remedies, which are available only in state courts, is particularly compelling where the picketing is only indirectly related to the use of the property, such as certain forms of informational picketing and picketing to induce sympathetic support for the union. Absent those remedies, the rights of uninvolved property owners will be exposed to serious abuse.

4. The two *Scott Hudgens* cases should be reviewed together because of overlapping considerations germane to each. Thus, the state's interest in maintaining public order through its trespass laws (one of the central factors in *Scott Hudgens II* is entitled to significant weight by the NLRB and the federal courts in delineating the limitations on the federal right to picket upon private premises (which is the problem presented in *Scott Hudgens I*).

The Chamber has urged in its *amicus* brief in *Scott Hudgens I*, that where picketing or other expressive activity is only indirectly related to the use of the property involved, the proponent of the picketing has a heavy

---

[5] *Linn* v. *Plant Guard Workers, Local 114*, 383 U.S. 53 (1966); *Taggart* v. *Weinacker's Inc., supra*, 397 U.S. 223 at 225; *United Auto Workers* v. *W.E.R.B.*, 351 U.S. 266 (1956).

burden in demonstrating the absence of alternative access to the intended audience; and that in such case the required showing is greater than where the picketing is directly related to such property use. In determining what degree of alternative access to the public is required, the Board and the courts should give due deference to the state trespass laws and the legitimate purpose they serve in maintaining public order. The state's interest in this regard supports the Chamber's position that only the lack of any reasonable means of alternative access will justify picketing on private property.

5. Also, a concurrent review of these cases by the Court will underscore the need for flexibility in the relief available to the parties. State forums in many instances provide for declaratory relief, which would be especially useful in those kinds of complex circumstances that characterize *Scott Hudgens I and II*.[6] Unlike the more clear-cut instances in which an adjacent public sidewalk provides ample opportunity for effective picketing of an establishment, the rights of the parties in a shopping center case will hinge on a number of the subtle factual distinctions. Such cases require an analysis of the size, configuration and location of the shopping center; whether the picketing relates to the use of the property directly, indirectly, or not at all; and the extent to which alternative means of access are available. Because of the myriad factual considerations involved, it is all but impossible for the parties even reasonably to foretell their rights in advance of litigation, a situation for which state declaratory relief proceedings are particularly suitable. Without such relief, parties would have to risk criminal prosecution or an unfair labor practice viola-

[6] In view of its holding on the preemption issue, the Georgia Appellate Court found it unnecessary to decide whether declaratory relief would be available in *Scott Hudgens II*. That question of state law remains to be determined if this Court rules that there is concurrent state jurisdiction.

tion in order to obtain a clarification of their rights. The NLRB does not provide for declaratory relief in such circumstances [7] and if exclusive jurisdiction is reposed in that agency, the flexibility possible through state declaratory relief action will be forfeited. The sanctioning of concurrent jurisdiction on the other hand will in many cases obviate the dilemna this Court avoided in *Steffel* v. *Thompson*, —— U.S. ——, 39 L. Ed. 2d 505 (1974). (The *Steffel* case arose out of an anti-war protestor's intrusion upon the premises of the same shopping center involved herein, and the Court there held that the Federal Declaratory Judgment Act was available to determine in advance of threatened prosecution the constitutionality of state trespass laws as applied to such activities.)

6. By addressing itself to both of these cases, the Court will be in a position to consider fully the subsidiary questions involved in according state courts concurrent jurisdiction with the NLRB. One such problem is whether in an action for trespass a state court should confine itself to applying only state law, subject to a subsequent ruling by the NLRB under the alternative access test, that supervening federal interests take precedence; or whether the state court should apply federal law, together with the state law, in order to render a complete adjudication of the parties' rights. Assuming both forums have concurrent jurisdiction to apply federal law, there remains the question of whether the NLRB should defer or give commity to the state court's trespass determinations. See, *Stein Printing Co.*, 204 NLRB No. 2, 83 LRRM 1580 (1973), where the NLRB deferred to a state court's interpretation of local statutes affecting the resolution of the Board proceeding. Because the foregoing problems are brought into clear focus by the two cases herein, the Court has a unique opportunity for comprehensive consideration thereof.

---

[7] Section 102.98, Rules and Regulations of the NLRB.

## CONCLUSION

For the foregoing reasons in the instant case, as well as in *Scott Hudgens I*, we urge the Court to grant the writ of certiorari.

Respectfully submitted,

MILTON A. SMITH,
General Counsel,

RICHARD B. BERMAN,
Labor Relations Counsel,
Chamber of Commerce of the
United States of America,
1615 H Street, N.W.
Washington, D.C.

GERARD C. SMETANA,
THOMAS CANAFAX, JR.,
Borovsky, Smetana, Ehrlich &
Kronenberg
120 South LaSalle Street
Suite 1820
Chicago, Illinois 60603

*Attorneys for the Amicus Curiae*

No. 74-1032

SCOTT HUDGENS, an Individual,
*Petitioner,*

v.

LOCAL 315, RETAIL AND WHOLESALE DEPARTMENT STORE UNION, AFL-CIO,
*Respondent.*

## SUPPLEMENTAL CERTIFICATE OF SERVICE

I, THOMAS CANAFAX, JR., being first duly sworn, depose and say that I have served three copies of the Supplemental Brief in the above-entitled causes, as per statute herein made and provided, on:

J. Albert Woll, Esq.
Woll, Mayer & Gold
736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D.C. 20005

Morgan C. Stanford, Esq.
Adiar, Goldwaithe, Stanford & Daniel
600 Rhodes—Haverty Bldg.
Atlanta, Georgia 30303

Lawrence M. Cohen, Esq.
Lederer, Fox and Grove
233 South Wacker Drive
Suite 7916
Chicago, Illinois 60606

Thomas E. Harris, Esq.
815 Sixteenth Street, N.W.
Washington, D.C. 20006

Dow N. Kirkpatrick, II, Esq.
Jones, Bird & Howell
Haas Howell Building
Atlanta, Georgia 30303

Charles J. Reasonover, Esq.
Deutsch, Kerrigan & Stiles
One Shell Square
New Orleans, Louisiana 70139

National Labor Relations Board
1717 Pennsylvania Avenue, N.W.
Washington, D.C. 20570
Attn: Mr. Elliott Moore,
Deputy Assoc. Gen. Counsel

Subscribed and Sworn to before me this 10th day of March, 1975.

Notary Public